No. 06-1131

In the Supreme Court of the United States

JOHN DAVIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a plaintiff may recover attorney's fees under the fee-shifting provision of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E), pursuant to the "catalyst theory" that this Court rejected in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001).

2. Whether petitioner is otherwise entitled to recover attorney's fees under *Buckhannon*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 460 F.3d 92. The order of the district court (Pet. App. 26-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2006. A petition for rehearing was denied on November 13, 2006 (Pet. App. 30). The petition for a writ of certiorari was filed on February 12, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, petitioner submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the Federal Bureau of Investigation (FBI), seeking all

audiotapes recorded during BRILAB, a criminal investigation of bribery and racketeering activities involving Louisiana politicians and labor unions in the late 1970s and early 1980s. Portions of those tapes were played at the trial of various individuals in 1981. After the FBI refused to release the tapes, petitioner filed suit against respondent under 5 U.S.C. 552(a)(4)(B), seeking a judicial order compelling their release. Pet. App. 3-4.

2. The district court initially granted petitioner's request and ordered the release of the tapes. Pet. App. 3-4. It reasoned that, to the extent the tapes had been played in open court, they could not be withheld under FOIA, *ibid.*, and that the government bore the burden of showing that the withheld tapes had not been played in open court. *Id.* at 4. The court of appeals reversed and remanded. 968 F.2d 1276 (D.C. Cir. 1992). It held that petitioner, and not the government, bore the burden of production on the question whether the withheld tapes had been played in open court, and remanded to give petitioner the opportunity to make a showing on that issue. *Id.* at 1282.

3. On remand, petitioner produced various materials from the criminal trial record demonstrating which audiotapes had been played in open court; in response, the FBI voluntarily produced 157 of the 163 tapes that it had initially withheld (and stated that it would have released another tape, but could not find it). The FBI continued to withhold the remaining five tapes, citing FOIA Exemption 7(C), which permits an agency to withhold records that were compiled for law-enforcement purposes but whose production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The district court held that the FBI's withholding of those tapes was proper.

Pet. App. 4. The court of appeals affirmed in part and remanded. No. 98-5080, 1998 WL 545422 (D.C. Cir. July 31, 1998). The court held that the government's efforts to find the missing tape were sufficient, but remanded for a determination whether "any of the five tapes withheld in their entirety * * * contains material that can be segregated and disclosed without unwarrantably impinging upon anyone's privacy." *Id.* at *1.

4. After the case was remanded to the district court, the FBI voluntarily produced one of the remaining five tapes, on the ground that the principal speaker on the tape had died. The FBI continued to withhold the other four tapes, averring in an affidavit that it could not determine whether the speakers on those tapes were living or dead. The district court held that the FBI's withholding of those tapes was proper. Pet. App. 5. The court of appeals reversed and remanded. No. 00-5414, 2001 WL 1488882 (D.C. Cir. Oct. 17, 2001). The court held that the affidavit that the FBI had submitted to the district court was insufficient to allow that court to evaluate whether the FBI had made adequate efforts to determine whether the speakers on those tapes were living or dead, and remanded to allow the FBI to "document what sources it consulted." *Id.* at *1.

5. The FBI then filed two additional affidavits in the district court, identifying the steps it had taken to determine whether the speakers on the remaining tapes were living or dead. In the course of proceedings on remand, the district court denied petitioner's motion for attorney's fees under FOIA's fee-shifting provision, 5 U.S.C. 552(a)(4)(E). Pet. App. 26-27. The district court ultimately held that the FBI's efforts were adequate and granted summary judgment on petitioner's underlying FOIA claim to the FBI. *Id.* at 28-29.

6. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1-25. The court concluded that the methods used by the FBI to determine whether the speakers on the remaining tapes were living or dead appeared to be insufficient, and remanded "to permit the agency an opportunity to evaluate the alternatives, and either to conduct a further search or to explain satisfactorily why it should not be required to do so." *Id.* at 22.

As is relevant here, however, the court of appeals agreed with the district court that petitioner was not entitled to attorney's fees. The fee-shifting provision of FOIA permits a district court to "assess against the United States reasonable attorney fees * * * reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. 552(a)(4)(E). The court of appeals noted that, in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), this Court had held that, under fee-shifting statutes that permitted courts to award fees to a "prevailing party," a plaintiff could not obtain fees pursuant to the "catalyst theory," whereby a plaintiff claims to be prevailing because its lawsuit brought about a voluntary change in the defendant's conduct. Pet. App. 23. The court of appeals further noted that, in *Oil, Chemical & Atomic Workers International Union* v. *Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (*OCAW*), it had applied the rule of *Buckhannon* to the fee-shifting provision of FOIA, on the ground that "the 'substantially prevail[ed]' language in FOIA [is] the functional equivalent of the 'prevailing party' language" in the statutes inter-

preted in *Buckhannon*. Pet. App. 23-24 (second brackets in original; quoting *OCAW*, 288 F.3d at 455-456). The court determined that petitioner could not otherwise recover fees under *Buckhannon* because petitioner had not obtained any relief in the litigation as a result of a judgment or order, as *Buckhannon* requires. *Id.* at 24.

7. The court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Pet. App. 30.

ARGUMENT

Petitioner contends (Pet. 14-22) that the court of appeals erred by holding that a plaintiff may not recover attorney's fees under the fee-shifting provision of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E), pursuant to the "catalyst theory." Petitioner further contends (Pet. 22-26) that the court of appeals erred by holding that, even apart from the "catalyst theory," he was not entitled to recover fees. The court of appeals' decision was correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 14-22) that this Court should grant review to determine whether a plaintiff may recover attorney's fees under FOIA pursuant to the "catalyst theory." That contention lacks merit.

a. Relying on its earlier decision in *Oil, Chemical & Atomic Workers International Union* v. *Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (*OCAW*), the court of appeals correctly held that a plaintiff may not recover attorney's fees under FOIA pursuant to the "catalyst theory." In *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), this Court held that,

under fee-shifting statutes that permit courts to award fees to a "prevailing party," a plaintiff that achieved its desired result because its lawsuit brought about a voluntary change in the defendant's conduct is not entitled to recover fees on the theory that its lawsuit served as a "catalyst" for that result. *Id.* at 600. Instead, the Court held, a "prevailing party" means a party that had obtained either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Id.* at 604. Those forms of relief, the Court explained, embody the type of "'material alteration of the legal relationship of the parties' necessary to permit the award of attorney's fees." *Ibid.* (citation omitted). In *OCAW*, the court of appeals applied the rule of *Buckhannon* to the fee-shifting provision of FOIA. 288 F.3d at 454-457.

Petitioner and his amici contend (Pet. 15-17; Public Citizen Br. 8-12) that the court of appeals erred in *OCAW* by applying *Buckhannon* because the fee-shifting provision of FOIA is triggered where a plaintiff "has substantially prevailed," 5 U.S.C. 552(a)(4)(E), whereas the fee-shifting provisions at issue in *Buckhannon* require the plaintiff to be a "prevailing party." The court of appeals in *OCAW*, however, correctly concluded that "the 'substantially prevail[ed]' language in FOIA [is] the functional equivalent of the 'prevailing party' language" of the statutes interpreted in *Buckhannon*. *OCAW*, 288 F.3d at 455-456. As the court explained, "all must agree that a 'prevailing party' and a 'party who prevails' are synonymous"; thus, while "FOIA's addition of the modifier 'substantially' might possibly be taken as *limiting* the category of 'prevailing parties,' * * * it cannot be taken as *expanding* the universe of parties eligible for a fee award." *Id.* at 455 (emphasis added). Where "a FOIA plaintiff * * * seek[s] thousands of documents

but wind[s] up with a judgment providing only a handful of insignificant documents," therefore, such a plaintiff may not have "substantially prevailed," even if the plaintiff has "prevailed." *Ibid.* Moreover, as the court of appeals noted, this Court has itself treated statutes using the "substantially prevailed" and "prevailing party" formulations as "interchangeable." *Ibid.* In *Buckhannon*, the Court cited a long list of statutes using each formulation (including the statute at issue here) before stating that it had "interpreted these fee-shifting statutes consistently." 532 U.S. at 603 & n.4 (citing *Marek* v. *Chesney*, 473 U.S. 1, 43-51 (1988) (appendix to dissenting opinion of Brennan, J.)). There is therefore no textual basis for concluding that a plaintiff that must show that it has "substantially prevailed" can avail itself of the "catalyst theory," when a plaintiff that need only show that it is a "prevailing party" cannot.

In support of his interpretation, petitioner heavily relies (Pet. 17-20) on the legislative history of FOIA's fee-shifting provision. Petitioner notes (Pet. 18) that Congress considered statutory language that specifically would have allowed for an award of attorney's fees only where the court had issued an injunction or order against the government, but ultimately adopted the "substantially prevailed" language instead. The court of appeals in *OCAW*, however, correctly rejected the identical argument, reasoning that the legislative history was "inconclusive" because "[n]one of the Committee reports mentions awarding fees in the absence of a judgment." 288 F.3d at 456. The court further noted that "both the House and the Senate reports contain statements suggesting that the FOIA provision was modeled after fee-shifting provisions allowing fees for a 'prevailing party,' which further supports treating FOIA no

differently than the statutes interpreted in *Buckhannon*." *Ibid.* Moreover, this Court rejected a similar argument in *Buckhannon* itself. The Court determined that the legislative history of another statute was "at best ambiguous as to the availability of the 'catalyst theory' for awarding attorney's fees" and did not compel the conclusion that the "catalyst theory" was available, "[p]articularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority.'" 532 U.S. at 608 (citations omitted).

Petitioner and his amici also suggest (Pet. 20-22; Public Citizen Br. 6-8) that the purpose of the FOIA fee-shifting provision would be frustrated if a FOIA plaintiff were unable to obtain fees pursuant to the "catalyst theory." Petitioner's policy arguments, however, are no different in kind from the policy arguments that this Court considered and rejected in *Buckhannon*. There, the Court expressed skepticism about the contentions that "the 'catalyst theory' is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees" and that "rejection of the 'catalyst theory' will deter plaintiffs with meritorious but expensive cases from bringing suit," on the ground that those contentions were "entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608. The Court added that those contentions "discount[ed] the disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal." *Ibid.* There is no justification for treating FOIA differently from other statutes with fee-shifting provisions based on petitioner's similarly speculative assertion (Pet. 16) that the government voluntarily produces documents, without being

subject to a court order, "in many if not most [FOIA] cases."

b. In any event, further review is not warranted because the decision of the court of appeals in this case does not conflict with the decision of any other court of appeals. The only other court of appeals to have considered the issue since this Court's decision in *Buckhannon* has held that a plaintiff may not recover attorney's fees under the fee-shifting provision of FOIA pursuant to the "catalyst theory." See *Union of Needletrades, Indus. & Textile Employees* v. *INS*, 336 F.3d 200, 206-207 (2d Cir. 2003) (*UNITE*).[1] Notably, that court, like the court in *OCAW*, concluded that the language of FOIA's fee-shifting provisions and of the provisions at issue in *Buckhannon* was "substantially similar," *id.* at 207 (citation omitted), and rejected the arguments that the legislative history of, and policy considerations animating, FOIA supported the conclusion that a FOIA plaintiff should be able to take advantage of the "catalyst theory." *Id.* at 208-210.

Petitioner contends (Pet. 10-11) that this Court should nevertheless grant review because the court of appeals' decision conflicts with decisions of other courts of appeals that were issued *before* this Court's decision in *Buckhannon*. Notwithstanding his suggestion (Pet. 11) that "in most if not all circuits there are solid precedents applying the 'catalyst theory' to FOIA cases," however, petitioner cites only two court of appeals cases so holding—and those cases were decided by the same two circuits that have since held, in the wake of the Court's decision in *Buckhannon*, that a FOIA plaintiff

[1] See also *Kasza* v. *Whitman*, 325 F.3d 1178, 1180 (9th Cir. 2003) (construing similarly worded fee-shifting provision in Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972(e)).

may *not* recover attorney's fees pursuant to the "catalyst theory." See Pet. 11 (citing *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), and *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, 546 F.2d 509 (2d Cir. 1976)). In each of their post-*Buckhannon* decisions, those courts cited their contrary pre-*Buckhannon* decisions but concluded that, "[b]ecause *Buckhannon* controls, the existing law of our circuit must give way." *OCAW*, 288 F.3d at 457; see *UNITE*, 336 F.3d at 210 (concluding that, while "one panel of this Court cannot overrule a prior decision of another panel," "an exception to this general rule arises where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent"). And even if petitioner had cited any pre-*Buckhannon* decisions of *other* courts of appeals with which the decision of the court of appeals would appear to conflict, such an apparent conflict would not warrant the Court's review because it is unclear whether those courts of appeals would continue to apply the same rule in the wake of *Buckhannon*.

Petitioner suggests (Pet. 13-14) that, even in the absence of a circuit conflict, this Court should grant review because "the D.C. Circuit's rulings have a dominant impact on FOIA law due to the fact that a particularly large number of FOIA decisions are brought in the District of Columbia." The question presented in this case, however, has already arisen in other courts since this Court's decision in *Buckhannon*, and will undoubtedly continue to do so—as the Second Circuit's decision in *UNITE*, and the decisions of various district courts cited by petitioner, see, *e.g.*, Pet. 10, amply demonstrate. And while the Second Circuit in *UNITE* followed the D.C. Circuit's earlier decision in *OCAW*, see 336 F.3d at 205-206, it did not defer to the D.C. Circuit's special exper-

tise in FOIA in doing so. There is therefore no compelling reason in this case for this Court to deviate from its ordinary practice of awaiting a circuit conflict before granting plenary review.[2]

2. Petitioner also contends (Pet. 22-26) that the court of appeals erred by holding that, even apart from the "catalyst theory," he was not entitled to recover fees under *Buckhannon*. That fact-bound contention lacks merit and in any event does not warrant further review.

In *Buckhannon*, the Court held that a party must obtain either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]" in order to qualify as a prevailing party for purposes of fee-shifting. 532 U.S. at 604. As the court of appeals correctly held (Pet. 24), petitioner does not satisfy either of those prerequisites because he has not obtained a judgment or court-ordered consent decree; instead, petitioner has obtained a series of remand orders from the court of appeals that merely leave open the possibility that he *may* ultimately prevail on the merits of the remaining portion of his underlying FOIA claim (regarding the handful of audiotapes that the government has not voluntarily produced).

Petitioner cites no authority for the proposition that such remand orders are sufficient to render a party "prevailing" for fee-shifting purposes. Instead, petitioner relies (Pet. 24) only on the D.C. Circuit's prior decision in *Davy* v. *CIA*, 456 F.3d 162 (2006). In *Davy*, however, the district court actually entered an order,

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[2] In addition, Congress is currently considering legislation that would amend FOIA to permit recovery of attorney's fees based on "a voluntary or unilateral change in position by the opposing party." See S. 849, 110th Cong., 1st Sess. § 4 (2007); H.R. 1309, 110th Cong., 1st Sess. § 4 (2007).

pursuant to a stipulation by the parties, whereby the government agreed to produce responsive documents by a certain date. See *id.* at 163-164. The court of appeals held that the plaintiff was "awarded some relief on the merits of his claim," *id.* at 165, because the district court's order memorializing the stipulation was "functionally a settlement agreement enforced through a consent decree." *Id.* at 166. Whatever the merit of that holding, it is inapposite here. The remand orders at issue in this case merely required the government to conduct further investigation (or make a further evidentiary showing). Those orders thus could not be said to award relief on the merits of petitioner's underlying claim, and fall well short of the "enforceable judgment[] on the merits" or "court-ordered consent decree[]" that *Buckhannon* requires.[3]

3. Finally, this case would constitute a poor vehicle for further review because it arises in an interlocutory posture. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Inst.* v. *United States*,

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[3] In *Sole* v. *Wyner*, No. 06-531 (argued Apr. 17, 2007), the Court is considering whether a party that obtains a preliminary injunction, but fails to secure any relief on the merits of its claim, can constitute a "prevailing party" for purposes of 42 U.S.C. 1988(b). This case need not be held pending the disposition of *Sole*, because a party that merely obtains a remand order of the type at issue here, unlike a party that obtains a preliminary injunction, does not secure any judicially ordered *relief* that it was initially seeking.

508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition). The court of appeals remanded to the district court for further proceedings concerning the applicability of FOIA Exemption 7(C) to the remaining audiotapes. Pet. App. 22. It remains possible, therefore, that petitioner will prevail on the merits of the remaining portion of his FOIA claim. If he does, petitioner will presumably renew his claim that he is entitled to fees under FOIA's fee-shifting provision. And if he does not prevail on the merits of his claim, petitioner can seek this Court's review on the question presented (and any other questions) in a subsequent petition once the district court enters final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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